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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

JASON ALAN MARIAN,

Defendant and Appellant.

G045620

(Super. Ct. No. 07SF0537)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, David A. Thompson, Judge. Affirmed.

Gerald J. Miller for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Melissa Mandel and Scott C. Taylor, Deputy Attorneys General, for Plaintiff and Respondent.

* * *

A jury convicted Jason Alan Marian of possessing child pornography (Pen. Code, § 311.11, subd. (a); all further undesignated statutory references are to this code), six counts of using a minor to produce material depicting sexual conduct (§ 311.4, subd. (c)), secretly filming another with intent to arouse, a misdemeanor (§ 647, subd. (j)(2)), two counts of sexual penetration of a minor by a foreign object (§ 289, subd. (h)), and two counts of oral copulation of a minor (§ 288a, subd. (b)(1)). The trial court granted Marian a new trial on one count of use of a minor in material depicting sexual conduct and one count of sexual penetration with a foreign object (the beach charges), the prosecutor declined to retry those charges, and the trial court sentenced Marian to an aggregate prison term of two years and eight months. Marian argues his convictions must be reversed because the trial court should have granted his pretrial motions to sever charges arising from his surreptitious filming of his 12- to 14-year-old dance students from charges of sexual penetration and oral copulation of his 15-year-old student, Mary F. He contends the trial court erred in failing to grant his new trial motion on all of his convictions. As we explain, none of these contentions has merit, and we therefore affirm the judgment.

I

FACTUAL AND PROCEDURAL BACKGROUND

Mary F. took dance classes, beginning at age 11 in sixth grade, at the Mission Viejo Dancing and Performing Arts Center (arts center), where Marian, in his mid-20's at the time, worked as a part-time instructor. Mary got to know Marian and felt they became close friends. At age 15, as a high school sophomore, Mary participated in a school project to learn about marine life at the Ocean Institute in Dana Point, where Marian also worked. His duties there included making computer podcasts about the

Institute. Marian accompanied Mary and the other students on a boat tour, paired off with Mary, flirted with her and asked her questions about her sexual experience. Over the next several months, they began texting each other in a flirtatious manner.

Sometime between late April and early June 2006, Marian invited Mary to the beach near the Ocean Institute. She parked at his house and they drove together in his car to the beach. When they arrived, Marian gave her a small bottle of Jagermeister liquor and photographed her taking a drink. The pair took other photographs, some of which included Marian's black Hyundai and his beach towel, flip flops, and beach bag, and then they walked to a nearby beach cave where Marian gave Mary some Malibu rum and she also drank from a Gatorade bottle Marian said contained strawberry daiquiris.

Mary began feeling intoxicated, the two lay down, and she disrobed to her bikini bathing suit. Marian massaged her neck, then her inner thighs, and then moved his hands inside her bathing suit, including inside the lips of her vagina. Marian took photographs of Mary after directing her to pull in her bikini bottom to expose her buttocks, and also to roll down her bikini bottom slightly. He asked her to turn over, and when she did, he kissed her on the mouth and touched her all over her body with his hands. They returned to his car, left the beach to eat at a sandwich shop and, when Marian's wife called him on his cell phone, he drove her to her car and she departed.

Marian continued to send Mary flirtatious and sexual text messages, and soon invited her to his home. She arrived around 5:00 p.m. after her tap dancing class. He seated her on a couch, they began kissing, and then he moved on top of her. He took off her clothes, inserted his fingers in her vagina, orally copulated her, and asked her to orally copulate him. When she hesitated, with his reassurance he would teach her how to do so, she performed oral sex on him and he ejaculated. Marian took her to the bathroom

for some mouthwash, and then she left. They continued to text each other, but later in the summer after Marian approached her at a party and pleaded she was “driving him crazy,” she became uncomfortable and told him not to contact her anymore. She did not tell anyone about the incidents initially because she felt embarrassed and knew it was wrong.

The next spring, in April 2007, Marian and his wife, who also taught dance at the art center, invited approximately 10 girls from their tumbling class to their home for a pool party and to use a water slide at a nearby park. Marian drove two of the girls to his home from the studio, and while waiting for the others to arrive, the girls noticed Marian disappeared into the downstairs bathroom for about 10 minutes. Marian’s wife, Andrea, soon arrived with the other girls and everyone went to the water slide at the park, then returned to the townhome, and all but Marian left again for the pool. Marian stayed behind, but then joined everyone at the pool.

When the girls finished swimming, Marian encouraged them to change out of their bathing suits. Andrea told the girls they could use the pantry or laundry room, but Marian directed them, including 14-year-old K.D., to the downstairs bathroom. When K.D. entered the bathroom and sat down to use the toilet, a video camera fell down from underneath the sink cabinet. There was athletic tape attached to the camera. K.D. saw her image on the camera monitor and a green light illuminated on the device, which she grabbed and placed in her bag before calling her parents to pick her up immediately. Her mother arrived in about 10 minutes, but in that time Marian stated he could not find a camera he had left outside the bathroom, and asked the girls to look through their bags for it, but K.D. did not disclose she found it. Once home, K.D. played the video on the camera, which included footage of Marian taping the device under the sink cabinet. K.D.’s parents called the police, and in interviews and testimony, other girls at the party

described how Marian had stayed behind when everyone initially went to the pool, urged the girls several times to change out of their bathing suits in the downstairs bathroom and, after all the girls had used the bathroom, seemed frantic when he could not find his camera.

Mary F. saw a news story about Marian videotaping the girls, told a friend about her encounters with him the summer before, and then disclosed Marian's sexual abuse to the owner of the dance studio and to the police, who arranged for her to make a covert, recorded telephone call to Marian. Mary called Marian on the pretext that her father had found her message to a friend on her MySpace social media account disclosing "the stuff we [Mary and Marian] did" in graphic terms, "like it talks about like me giving you head and you [finger]banging me and stuff," and she feared her father's reaction. Marian seemed suspicious of Mary. He hesitated and stumbled over his words before admitting he suspected she had disclosed "something we did," presumably their sexual encounters, to his boss Jena at the dance studio, causing him to lose his job. He said, "You know, you know I don't know what you said to Jena," and then reiterated, "Did you say something to Jena," disclosing "because I was, Andrea and I were both fired." Marian accused her, "We were fired because of something you said to Jena."

When Mary denied this, Marian stated, "I don't . . . know what, what's been going on, but uh-um you know I, I've been totally honest with Andrea, about everything." Stunned, Mary asked, "Wait so she knows about you and I," and Marian answered, "I haven't kept any secrets, um, I had to tell her everything." Mary pressed, "Even [about] when I was at your house," and Marian admitted, "No, I mean told about you visiting me at the beach." He admitted his wife was "pissed." Marian emphasized, "She knows everything," but when Mary asked specifically if Andrea knew "that I gave

you head and you banged me,” Marian became reticent, “I, I don’t want to get into anything else, cause now it’s like legal matters.”

Mary replied, “That’s what I’m worried about,” and returned to her fear that “my dad’s going to be home really soon,” and asked Marian, “What should I say?” Marian directed her, “You need to lie, I mean or you know it never happened.” Marian began to repeat as a mantra over the remainder of the conversation, “Yeah, just never happened,” and then turned on Mary with his predicament: “Do you realize what you’re saying can put me into jail?” “Like I would, I would be in jail for a long time. I have a family.” “I have a seven-month [-]old son that I will never see grow up.” Marian continued to deny Mary’s attempts to elicit whether Andrea really knew “about you and me” and brushed aside Mary’s incredulity (“she’s okay with that?”), stating both that “Andrea and I have no secrets” and “I haven’t told anyone,” before returning to his theme, “But nothing happened and if you have something that says it did, you need to get rid of it. You need to deny it.” Marian ended the call because “I got to go back to work now.”

Before trial, Marian moved to sever the six counts related to filming the minors in his bathroom from the counts involving Mary F. at the beach and at his townhome, but the trial court denied the motion. Marion renewed the motion when the matter was assigned to a different judge for trial, but the trial court again denied the motion.

At trial, after K.D. and numerous girls from the tumbling class recounted the April 2007 events at the pool party, and Mary F. described the incidents the summer before at the beach and on the couch at Marian’s home, Marian testified in his own defense. He explained he never intended to videotape the girls at the party, but claimed

instead he positioned the camera in a game of “voyeuristic foreplay” with his wife. He admitted his wife did not know about the game. He also admitted that when he stayed behind initially while the partygoers went to the swimming pool, he reviewed the images captured on the camera, which included his wife, and masturbated. He admitted one of the young girls was captured on the video.¹

Marian denied having a sexual relationship with Mary. He claimed not to have sent her text messages, nor did he ask Mary about her sexual experiences. Marian explained Mary sent him a couple of text messages, but these were questions about her school report on the Ocean Institute. According to Marian, “Everything was professional.”

Marian denied he visited the beach with Mary. He claimed that on June 4th, the day recorded in digital “metadata” in the pictures of Mary taken at the beach, he was working at the Ocean Institute on two projects on his computer. He introduced printouts of those two projects into evidence, but not the computer metadata for those documents, which his attorney did not have analyzed by an expert witness until after the trial, as we discuss below. The evidence showed that the June 4th beach date was not necessarily accurate: if the date set on the digital camera was inaccurate when the beach pictures of Mary were taken, the date recorded in the metadata of each digital picture would also be inaccurate. Mary testified that Marian seduced her at the beach on a weekend day after April 18, 2006, but before June 1, 2006.

According to Marian, however, Mary, accompanied by a high school boy, stopped by the Ocean Institute on Sunday, June 4th, stated she was going to the beach, and asked to borrow a beach towel. He told her he had one in his car, gave her his keys,

¹ The parties had stipulated the video recorder captured images of Andrea, many of the girls at the party, and an unidentified female.

and she returned the keys five minutes later. Marian noted at trial that his wife's digital camera was also in the car. He did not take and was not in any of the 48 photographs of Mary on the beach that investigators discovered on his laptop and external hard drive at his home, including the ones of Mary's buttocks. He acknowledged the metadata in the photos showed they had been taken with the camera he said belonged to his wife. He explained that after borrowing his towel, Mary returned from the beach on June 4th to his office with his beach bag, where he recalled his wife's camera had been stored, she handed him a camera memory card, told him it contained some pictures for a video project Marian was making for the dance studio, and asked him to make her a copy on a compact disk (CD). Marian testified he burned a CD copy of the memory card contents without viewing the material, and looked for but could not find Mary in the parking lot to give it to her, so he left the CD on the windshield of her car, as she had requested. He denied Mary visited his home in mid-June as she claimed or at any other time, denied he ever flirted with her, and denied any sexual contact with her.

Marian's wife testified in his defense. She admitted that when the police interviewed her the day after the pool party and asked her about his conjugal voyeurism alibi, specifically, "[H]ow does it make you feel that you were being videotaped without your knowledge," she responded, "It's disgusting." But at trial she vouched for her husband, claiming this type of taping was "a game for us." While the couple had filmed themselves having sex before, Marian had done so with her knowledge, and she admitted in her police interview she was puzzled he did not tell her he hid a camera to film her in the bathroom, as he claimed. But at trial she claimed secret filming, while new, was not unheard of between them; in fact, Marian began hiding a camera to secretly tape her in their upstairs bathroom just "a couple weeks" before the pool party.

The jury deliberated less than an hour before convicting Marian on all counts. As we discuss below, the trial court granted Marian a new trial on the two counts arising at the beach, which the prosecutor eventually declined to pursue, and Marian now appeals.

II

DISCUSSION

A. *Severance*

Marian contends the trial court erred by denying his pretrial motions to sever the videotaping-related charges for a separate trial from the counts involving sexual offenses against Mary F. We disagree. Section 954 provides the statutory predicate for joinder. Specifically, “[a]n accusatory pleading may charge two or more different offenses connected together in their commission, or different statements of the same offense *or two or more different offenses of the same class of crimes or offenses*, under separate counts” (Italics added.) The law prefers joinder of charges of the same class to conserve public funds and scarce judicial resources, and to avoid harassing the defendant with serial trials. (*People v. Soper* (2009) 45 Cal.4th 759, 781-783; *People v. Ochoa* (1998) 19 Cal.4th 353, 408-409 (*Ochoa*).

Offenses are ““of the same class”” if they possess common characteristics or attributes. (*Aydelott v. Superior Court* (1970) 7 Cal.App.3d 718, 722.) For example, assaultive crimes against the person, such as murder, robbery, and rape, are of the same class. (*People v. Alvarez* (1996) 14 Cal.4th 155, 188.) In contrast, possession of drug paraphernalia (Bus. & Prof. Code, § 4149) shares no common characteristics or attributes with the crime of failure to appear (§ 853.7), and therefore does not belong to the same class of crimes. (*People v. Madden* (1988) 206 Cal.App.3d Supp. 14, 19.)

Whether the prosecution has properly joined charges under section 954 is a question of law subject to independent review on appeal. (*People v. Cunningham* (2001) 25 Cal.4th 926, 984.) The interests of justice may require the trial court to sever charges otherwise suitable for consolidation if the defendant demonstrates prejudice. We review the trial court's assessment of prejudice with deference, under the abuse of discretion standard (*ibid.*; *People v. Lucky* (1988) 45 Cal.3d 259, 276-277 (*Lucky*)), based on the "showing[] then made and the facts then known" (*People v. Marshall* (1997) 15 Cal.4th 1, 27 (*Marshall*)). It is the defendant's burden to demonstrate "clear" prejudice from the joinder of charges. (*Ibid.*; *People v. Bean* (1988) 46 Cal.3d 919, 938.) A ruling proper at the time may require reversal if, as the trial unfolds, the defendant demonstrates joinder "actually resulted in "gross unfairness" amounting to a denial of due process.'" (*People v. Mendoza* (2000) 24 Cal.4th 130, 162.)

Factors relevant both to the trial court's joinder decision and to assessing prejudice include: "(1) would the evidence of the crimes be cross-admissible in separate trials; (2) are some of the charges unusually likely to inflame the jury against the defendant; [and] (3) has a weak case been joined with a strong case or another weak case so that the total evidence on the joined charges may alter the outcome of some or all of the charged offenses. . . ." (*Marshall, supra*, 15 Cal.4th at p. 28 [if applicable, court also considers prejudice in joining an ordinary felony for trial with a capital offense].) In particular, cross-admissibility dispels any notion of prejudice, since each offense could be admitted in a separate trial of the other offense. (*Ibid.*) Even when the prosecution presents capital charges, joinder is proper with or without cross-admissibility where the evidence of each charge is so strong that consolidation is unlikely to affect the verdict. (*Lucky, supra*, 45 Cal.3d at p. 277.)

Here, Marian insists the unlawful filming, use of a minor for modeling sexual conduct, and child pornography possession charges were not in the same class of crimes or offenses as his alleged sexual contact with Mary F., and therefore could not be joined together. He characterizes the former as “passive,” while the latter involved “direct sexual acts.” He acknowledges “the two sets of offenses broadly involved the topics of ‘sex’ and ‘underage females,’” but he claims this similarity among the crimes was too general to fairly try them together. He relies on *People v. Frank* (1933) 130 Cal.App. 212 (*Frank*) for the proposition that a putative class of “Crimes Against the Person,” though grouped this way in a shared Penal Code title, is too disparate for joinder because it would lead to absurd results like trying libel claims together with an unrelated murder or a charge of rape with pawnshop usury. (See *id.* at pp. 213, 215.)

But the similarity here was greater than the examples considered in *Frank*. As other courts have observed, “Offenses are of the same class when they possess common attributes, such as lewd conduct toward young female minors.” (*People v. Leney* (1998) 213 Cal.App.3d 265, 269; see *People v. Nguyen* (2010) 184 Cal.App.4th 1096, 1112 [“section 954 permits joinder of ‘offenses of the same class of crimes.’ Sex offenses ‘belong to the same class of crimes’”].) The trial court reasonably could find Marian’s argument against joinder based on a distinction between “passive” and “direct” sex crimes unpersuasive because the offenses demonstrated a common intent to gratify his sexual interest in young girls. (See *People v. Lindsay* (1964) 227 Cal.App.2d 482, 492 [“rape, sex perversion and sodomy clearly belong to the same class of crimes” because the “intent to satisfy sexual desires runs through” them].)

This shared intent also amply supported the trial court’s conclusion the offenses were cross-admissible. (See Evid. Code, § 1101, subd. (b) [“Nothing in this

section prohibits the admission of evidence that a person committed a crime . . . or other act when relevant to prove some fact (such as motive, opportunity, *intent*, preparation, plan, knowledge, identity, absence of mistake or accident . . .) other than his or her disposition to commit such an act,” italics added].) As our Supreme Court has observed, the least degree of similarity is required for admissibility of other offenses or acts to show a common intent or motive, compared to showing a common scheme or plan or identity. (*People v. Ewoldt* (1994) 7 Cal.4th 380, 402.) Here, in particular, evidence of Marian’s common intent based on a sexual interest in young girls was relevant to rebut his claim he intended the taping as a form of sexual foreplay with his wife.

Similarly, the common sexual nature of his offenses also made each cross-admissible under Evidence Code section 1108, subdivision (a), which provides: “In a criminal action in which the defendant is accused of a sexual offense, evidence of the defendant’s commission of another sexual offense or offenses is not made inadmissible by [s]ection 1101[, subdivision (a), generally barring propensity evidence], if the evidence is not inadmissible pursuant to [s]ection 352.” As noted, the other crimes evidence was probative to rebut Marian’s stated reason for installing the secret recording device and, although a grim reminder of the banality of child sex crimes, none of the offenses stood out as particularly more shocking or inflammatory than the others to trigger section 352 as a bar to joinder.

Marian’s reliance on *People v. Earle* (2009) 172 Cal.App.4th 372, where the appellate court reversed the joinder of indecent exposure and assault with intent to commit rape charges, is misplaced. Unlike the present case, the charges in *Earle* showed no common sexual interest in a targeted subgroup of potential victims. Accordingly, the trial court here did not err in concluding Marian’s offenses were cross-admissible.

The cross-admissibility of the offenses dispels any notion of prejudice from their joinder. (*Marshall, supra*, 15 Cal.4th at p. 28.) Other factors for assessing prejudice also support the trial court’s ruling. None of the offenses was particularly inflammatory, this obviously was not a capital case, and the evidence of the taping-related offenses was strong, making it unlikely joinder with the Mary F. offenses tipped the jury to convict Marian. (See *ibid.*) In any event, the trial court in evaluating any potential prejudice from joinder found Marian’s account of the recording “preposterous,” and there is no reason to second-guess this implicit determination severance would have made no difference given the strong evidence on these counts. (*Lucky, supra*, 45 Cal.3d at pp. 276-277.)

According to Marian, the trial court’s, and the jury’s presumably similar, negative credibility finding on the taping-related counts demonstrates joinder of those charges with the charges involving Mary F. became prejudicial as the trial unfolded, requiring reversal on appeal even if the trial court’s pretrial denial of his severance motion was not erroneous. In effect, he argues he was prejudiced by his own lack of credibility on the taping charges, which had a damaging spillover effect on his testimony concerning the Mary F. charges that would not have occurred if the trial court had granted his severance motion. This creative tack, however, has no merit precisely because evidence of the offenses was cross-admissible, and the jury therefore was entitled to evaluate his credibility as a whole, not in a blinkered fashion.

Simply put, the fact that probative, admissible evidence reflects negatively on a defendant does not require its exclusion: “prejudicial” is not synonymous with “damaging” under Evidence Code section 352 (*People v. Karis* (1988) 46 Cal.3d 612, 638); similarly, there is no reason relevant cross-admissible evidence requires severance

simply because it damages the defendant's case. Additionally, the evidence supporting the charges involving Mary F. was strong, including photographs depicting their beach excursion, his admissions in the covert call with Mary that she visited him at the beach, that his wife "knows everything" and was "pissed" about their dalliance, and his entreaties to Mary, "You need to lie," "You need to deny it," and "to get rid of" any evidence. In sum, the trial court reasonably could conclude the prosecution did not gain an unfair advantage by joining a weak charge to a strong one or that a fair trial otherwise required severing the charges. The trial court did not err in denying severance.

B. *New Trial*

Marian asserts evidence discovered after the trial entitled him to a new trial on all the charges, not just the charges involving Mary F. at the beach. The trial court granted Marian's new trial motion in part, based on the belated discovery of evidence supporting Marian's alibi regarding the beach incident.

Specifically, Marian had testified he was at the Ocean Institute working on two projects on his computer on the date of his alleged beach tryst with Mary F., and he introduced into evidence at trial the two documents on which he had been working. But his attorney did not have the metadata in these computer documents examined by an expert. After trial, a defense expert explained in support of Marian's new trial motion that the metadata in the two documents was consistent with those computer files being accessed at various times throughout the day on June 4, 2006, which the defense asserted showed Marian could not have been at the beach with Mary. A computer expert for the prosecution, however, explained that the metadata could be falsified at a later date and that other files purportedly generated on Marian's work computer on the beach date did

not require someone to be present at the computer, which Marian disputed with contrary expert testimony.

Marian based his new trial motion on this newly discovered metadata evidence, relying on section 1181, subdivision (8), which provides for a new trial “[w]hen new evidence is discovered material to the defendant, and which he could not, with reasonable diligence, have discovered and produced at the trial.” In the alternative, Marian asserted ineffective assistance of counsel required a new trial because of his trial attorney’s failure to diligently discover and present the evidence. The trial court granted the new trial motion on grounds of newly discovered evidence, but only with respect to the charges involving Mary F. on the day at the beach, and Marian contends the trial court erred by not granting a new trial on all the charges. The Attorney General does not appeal the trial court’s new trial ruling on the two beach counts, which the prosecutor eventually dismissed.

The standard of review on appeal from denial of a new trial motion is abuse of discretion. “The determination of a motion for a new trial rests so completely within the court’s discretion that its action will not be disturbed unless a manifest and unmistakable abuse of discretion clearly appears.” (*People v. Staten* (2000) 24 Cal.4th 434, 466 (*Staten*), internal quotations omitted.) “To grant a new trial on the basis of newly discovered evidence, the evidence must make a different result probable on retrial.” (*Ochoa, supra*, 19 Cal.4th at p. 473; see *People v. Delgado* (1993) 5 Cal.4th 312, 329 [more favorable result based on new evidence must be reasonably probable].) “In addition, ‘[w]e accept the trial court’s credibility determinations and findings on questions of historical fact if supported by substantial evidence.’ [Citation.]” (*People v. Verdugo* (2010) 50 Cal.4th 263, 308 (*Verdugo*); *People v. Cua* (2011) 191 Cal.App.4th

582, 608 [trial court’s opportunity to observe witnesses and superior ““feel of the case”” control].)

The trial court reasonably could grant the new trial motion solely on the beach charges because the new metadata evidence only pertained to those charges. The metadata allegedly from Marian’s computer documents established a potential alibi for him only as to the beach incident, not on the date of any of the other charges. Marian, however, asserts the trial court was required to grant a new trial on *all* the charges because if a jury on retrial believed that the metadata from the June 4th computer documents was accurate and not falsified, the jury not only would acquit him of the beach charges, but also would find him credible in denying the later sexual conduct with Mary F. at his townhome. Marian also argues his enhanced credibility would have resulted in a more favorable outcome on the charges involving his inadvertent taping of his young students.

On the taping-related charges in particular, the trial court reasonably could conclude it was wholly improbable the document metadata evidence would make any difference whatsoever. The trial court found Marian’s account of his voyeurism alibi “preposterous” and was inclined to believe he induced his wife to support his implausible explanation. We may not second-guess these credibility determinations (*Verdugo, supra*, 50 Cal.4th at p. 308) in assessing the probability new evidence on one set of charges would alter the outcome if those other convictions were also retried.

The same is true concerning the townhome charges. Marian casts these and the beach charges as a pure credibility contest pitting him against Mary F. But the flaw in Marian’s argument is that even if the jury believed he did not tinker with or fabricate the metadata in the documents on which he claimed to be working on June 4, it was not

required to credit him and disbelieve Mary. To the contrary, the jury reasonably could believe the beach incident did not occur on June 4th, but instead sometime before June 1, as Mary recalled, and that the date set on Marian's digital camera was simply incorrect or had been modified. The question might be close enough that under the reasonable doubt standard the jury might decline to convict Marian of the beach charges. We find that unlikely given the strength of the evidence against Marian, including his demonstrated sexual interest in young girls, his improbable explanation concerning the bathroom taping of his students, the photographic evidence of his sexual interest in Mary, his doubtful explanation of those photographs being taken with his camera and capturing his car, his flip flops, his towel, his beach bag, and being found on his computers, and the incriminating covert call in which he directed Mary to lie and to destroy any evidence she might have, while failing to deny he digitally penetrated her and had her orally copulate him "at [his] house."

Even assuming the trial court properly granted Marian's new trial motion concerning the beach charges, which the Attorney General did not appeal, the court simultaneously could conclude admission of the document metadata evidence from June 4th did not make a more favorable outcome probable on the later townhome charges. (*Ochoa, supra*, 19 Cal.4th at p. 473 ["the evidence must make a different result probable on retrial"].) The trial court expressly found at the new trial hearing that Mary F. gave credible testimony and Marian was a liar unworthy of belief. (*Verdugo, supra*, 50 Cal.4th at p. 308.) As noted, the possibility Mary misremembered the date on which the beach incident occurred did not mean the jury was likely, given the strength of the evidence against Marian, to conclude all her testimony was false. In the final analysis, we cannot say "a manifest and unmistakable abuse of discretion clearly

appears” (*Staten, supra*, 24 Cal.4th at p. 466, internal quotations omitted) in the trial court’s decision not to grant a new trial on the townhome or bathroom charges.

III

DISPOSITION

The judgment is affirmed.

ARONSON, J.

WE CONCUR:

RYLAARSDAM, ACTING P. J.

MOORE, J.